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A STUDY IN THE DEVELOPMENT OF CREDITORS' RIGHTS.

The law defining the rights of creditors has generally resembled the Holy Roman Empire; it has been an abstraction, recognized but not often seen. Certainly its treatment has not been always of the sort that makes for coherency or consistency. We have all read discussions about different wrongs upon creditors, we are familiar in daily practice with various forms of procedure for vindicating these injuries, and we know that certain things are "void as against creditors," while certain others are not. Mention of the "rights of creditors" occurs all through the books, from Lord Hardwicke's time[1] to the present day. If one picks up a late volume of any modern reports he will find something like this:

"The rights of creditors remained, even if the corporation and its stockholders were ready to give away every right within their power."[2]

But all this does not carry us beyond the bounds of a certain empiricism if it is true that back of the numerous modern instances lies a fundamental principle. This principle can be found, but only by careful orientation. The seeker must forget that there ever was a bankrupt act, a fecund system of equity, an occasionally clairvoyant legislature, and all other agencies of progress, and then, taking the situation as it would be left by means of this stripping process, ascertain just what a creditor can do to enforce his debt. When this far territory is mastered, the road to present times is straighter, and on the way the successive stages of development will be the easier to recognize. Let us then recur to first principles.

[1]Townshend *v.* Windham (1750) 2 Ves. Sr. 1.

[2]Ward *v.* City Trust Co. (1908) 192 N. Y. 73.

If the debtor is solvent, the creditor's right is simply to have the debt paid. That can be enforced by a common law suit which will result in a judgment. The next thing is to issue execution upon the judgment. A classic writer describes this as "the last step * * * or putting the sentence of the law in force."[3] By means of this writ according to its nature,—for originally there were four kinds of execution, one of them being against the body of the debtor,—it was intended that the creditor should end by finding himself possessed of money sufficient to defray the debt. In course of time all forms of execution have been reduced to one, the writ of *fieri facias,* which is now available against both the lands and goods of the debtor.[4] Therefore we may use this writ for all purposes of illustration.

Originally the creditor could not sell land in his execution, but now he can by statute in every jurisdiction, so we may consider both land and personal property as equally subject to the writ. Later day American statutes have also given to the judgment an effect which it did not have at common law. A judgment when docketed in the proper book is nowadays a lien upon all of the defendant's real estate,[5] and also as against his personal estate a writ of execution is a lien from the moment when it has been put into the sheriff's hands. It will not confuse our search if we assume the existence of these rights of the creditor holding a judgment.

In the eye of the common law, it is not until the creditor has acquired this status that he is in any position to attack his debtor's disposition of his property; it is not until then that he is in a legal sense able to vindicate injuries inflicted by any such conduct on the debtor's part. Meanwhile the courts cannot hear his complaint of the debtor's disposition of property, whatever it may be, because a common law court can try only one issue at a time, and the

[3] 3 Bl. Comm. *411.

[4] Originally creditors could realize upon the debtor's land by sale, as distinct from use, only by means of bankruptcy proceedings. Hence in Chambers *v.* Thompson (1793) 4 Bro. C. C. 434, to a bill filed to discover whether the defendant had committed an act of bankruptcy, it was pleaded that the discovery would subject the defendant to a forfeiture of his land. This plea was overruled, as we shall see. If a trader died before an adjudication of bankruptcy, his land could not be sold, until by Stat. 47 Geo. III, c. 74, this defect was cured. See Keene *v.* Riley (1817) 3 Mer. 436. It is remarkable that in several of our States up to the time of the Civil War, land could not be sold on execution. See Covington Co. *v.* Shepherd (1858) 21 How. 112.

[5] Consequently nowadays a judgment can operate as a preferential or fraudulent transfer of the debtor's lands, within the meaning of the Bankruptcy Act. *Re* Truitt (1913) 203 Fed. 550; Clark *v.* Iselin (1874) 21 Wall. 372.

plaintiff can only establish himself as a creditor by the judgment of a court pronouncing upon his claim. And so with the Statute of Fraudulent Conveyances about to be mentioned, it was only judgment creditors that the framers of that act had in mind, and it is only judgment creditors to this day who, according to the strict common law conception, can avail themselves of the rights which that statute confers. As has been said by Denio, J., "When a conveyance is said to be void against creditors, the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts."[6] And as said by Bronson, J.,[7] a fraudulent sale "cannot be impeached by a creditor at large. It must be a creditor having a judgment and execution or some other process which authorizes a seizure of goods."[8]

Now if the judgment debtor is solvent in the broad sense when the creditor issues execution, that is, has enough assets to meet his debts in full, it is obvious that this common law remedy is sufficient, or at least needs only to be supplemented by the ancillary procedure of equity to which we shall presently advert. And hence it would hardly seem to have been necessary for the courts so frequently to reiterate the well established doctrine that a solvent debtor owes no duty of trust or otherwise to his creditors with respect to his property.[9] But if the debtor is insolvent, that is, if all of his property is not sufficient to meet all of his indebtedness, clearly a different situation is presented. What would one say is the right of the creditor?

The answer depends upon whose interest we are considering.

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[6]Van Heusen *v.* Radcliff (1858) 17 N. Y. 580, 584.

[7]Noble *v.* Holmes (N. Y. 1843) 5 Hill, 194.

[8]Schofield *v.* Ute Coal etc. Co. (1899) 92 Fed. 271; Jones *v.* Green (1863) 1 Wall. 330; Thompson *v.* Reed (1913) 202 Fed. 870. The present is not the place to deal with the apparent exceptions afforded by Edwards *v.* Harben (1788) 2 T. R. 587. When the writ of attachment or provisional remedy of seizure of the goods of an absent debtor came into common use, the courts took the view that the sheriff in levying an attachment occupied the same status as when he levied under an execution, Falconer *v.* Freeman (N. Y. 1847) 4 Sandf. Ch. 565; and consequently it was held that he had the same power after levy with respect to goods conveyed in fraud of creditors. Rinchey *v.* Stryker (1863) 28 N. Y. 45; Hess *v.* Hess (1889) 117 N. Y. 306; Mechanics & Traders Bank *v.* Dakin (1873) 51 N. Y. 523.

[9]*Ex parte* Ruffin (1801) 6 Ves. 119, 126; Swan Co. *v.* Frank (1893) 148 U. S. 603; Case *v.* Beauregard (1878) 99 U. S. 119; United Cigarette Mach. Co. *v.* Winston Co. (1912) 194 Fed. 947; Mills *v.* Northern Ry. (1870) L. R. 5 Ch. App. 621; Pond *v.* Framingham R. R. (1881) 130 Mass. 194; Graham *v.* Railroad (1880) 102 U. S. 148; Smith *v.* Bowker Tonney Co. (1913) 207 Fed. 967. Hence they cannot appear in a partition suit affecting their debtor's land. See 13 Columbia Law Rev. 755.

If we have in mind only the interest of a particular creditor who has obtained a judgment, then our answer, while practical enough, would hardly make for the upbuilding of a wholesome branch of law. We should say that if this particular debtor could levy ahead of anyone else on something that the creditor owned, it is immaterial whether the other creditors found something on which they could levy. And if the debtor had property which was such in a practical sense, but not so recognized at common law, in short, rights enforceable only by aid of a court of equity, then this creditor would feel that the Court of Chancery should give him this same exclusive right to realize on his judgment, if he applied for such relief ahead of the other creditors.

There we have one way of looking at the matter—to place the whole law of creditors' rights, in the case of an insolvent debtor, upon the basis of priority in execution, and to make the "race of diligence"—to use the phrase which has become, alas! hackneyed by use—the be-all and end-all of the law.[10]

Compare that with the result obtained by viewing the situation from the standpoint of all the creditors instead of merely one of them. When we take this position, we can reach but one conclusion, that when the debtor is insolvent the rights of all the creditors are to an equal distribution of the assets, and the rights of each creditor end with his *pro rata* portion. It is not fair that one creditor should be paid more than another. They are all of the same class and they should all suffer equally. It is the universal recognition of this right, however imperfectly expressed or taken for granted it may be in decisions and legislation, that has created the body of law which we may describe under the head of creditors' rights. It is the right of all the creditors that all the debtor's assets should be applied to the payment of his debts and that equal distribution should be made in the application.[11]

[10]All other considerations apart, even at the present day it is well settled that creditors owe no fiduciary duty to each other. Each may sue his debtor, and collect or settle as he pleases. Johnson *v.* Trust Co. (1900) 104 Fed. 174; Brown *v.* Webb (1851) 20 Oh. 389; Frost *v.* Goddard (1845) 25 Me. 414; Foster *v.* McAlester (1902) 114 Fed. 145; *Re* Hawkes (1913) 204 Fed. 309.

[11]The occasions on which this idea has been expressed with more or less force are numerous. Thus in Wilson *v.* Webb (1788) 2 Cox C. C. 3, Eyre, L. C. B., expresses it in a negative form,—Equity, he says, will never lend its aid to defeat fair creditors. To the same effect is Constantein *v.* Blache (1786) 1 Cox. C. C. 286. In overruling the plea to the bill of discovery filed in Chambers *v.* Thompson (1793) 4 Bro. C. C. 434 (see note 4, *supra*), Lord Loughborough remarked that the distribution of assets effected by bankruptcy is merely giving the creditors

Thus we have two lines of thought upon this subject, one resting entirely on the idea of priority, the basis of the other being equality. These ideas are inconsistent and each has had its partisans. The irreconcilable conflict has continued to the present day, and it is not too much to say that the whole body of law with which we are interested owes its growth to the intensity of this conflict. Hence, no study of this subject would seem to be well based that does not start at this point.

These two conflicting ideas have this much in common, that the respective rights which they embody are capable of invasion by the same acts. Whether we adopt the selfish or the altruistic theory of creditors' rights, a given transaction on the debtor's part if wrong from one point of view would be equally tortious from another. If a court should recognize the existence of a right based on either the selfish or the altruistic line of thought above outlined, it would have to recognize certain action by the debtor as invasions of that right.

What are those wrongs which the debtor can inflict? Experience has rendered possible classification, not logical in all its outlines by any means, but sound enough in the main for convenience of treatment. The classes thus created are three, and their respective ideal cases are these: (1) where A, the debtor, gives his property to B in order to prevent A's creditors from satisfying their just demands therefrom; (2) where A pays B, a creditor, in order to prefer B over the rest of the creditors; (3) where A, with B's consent, has been held out as the ostensible owner of goods which really belonged to B, so that on the faith of A's apparent ownership of them he might contract debts. Adopting nomenclature which mirrors more or less the history we are about to inspect, the first of the above cases is a case of fraudulent transfer, the second of a preferential transfer, or more shortly a preference,

their own. In Pickstock *v.* Lyster (1815) 3 M. & S. 371, Lord Ellenborough describes a general assignment as "a discharge of the moral duty attached to the character of debtor to make the fund available for the whole body of creditors." On the same foundation rest the cases which uphold the right of creditors to effect combined action, by means of a reorganization committee, when their debtor's affairs have gone wrong. See Investment Registry, Ltd. *v.* Chicago etc. Ry. (1913) 206 Fed. 488, and cases there cited. And it is believed that this same idea caused the modern rule which forbids any creditor, who has joined with the others in an agreement extending the time for the payment of their claims, from getting, by means of a secret arrangement with the debtor, more than any of the others. McMullen *v.* Hoffman (1899) 174 U. S. 654; Pittsburg etc. Co. *v.* Monongahela etc. Co. (1905) 139 Fed. 782; Security etc. Co. *v.* First Nat. Bank (1913) 203 Fed. 632.

and the third is a case of reputed ownership. It is clear that in each of these cases, whether we adopt the selfish or the altruistic theory, each creditor has been wronged. In the case of a fraudulent transfer, available property has been given to a third person, and thus *in limine* equal distribution among the creditors has been forestalled. A preferential transfer prevents equality of distribution. Finally, in the case of reputed ownership, it is highly unfair that those who were deceived into giving credit by means of an appearance of ownership on their debtor's part should be deprived of the very property in question. And it is just as clear that each of these successive acts of the debtor violates the selfish theory of the creditor's right. In each case he is prevented from gaining the crown of his successful race for priority, because the debtor has removed the property from the reach of his process.

Now, if in the beginning either common law or equity had been capable of relieving against these wrongs the conflict between the two theories of right would soon have been determined without the aid of legislation, the struggle would not have been very prolonged, and the development of the law would have been all the easier to trace. But right there the trouble lies.

It is obvious that the common law cannot give relief in any of those cases on either theory. You cannot take the goods of B to satisfy your claim against A, no matter with what intent A had given the goods to B, because B has the legal title; and the creditor of A cannot maintain trover. It does not matter with what intent A has paid B's claim, because at common law to this very day a man has a right to prefer one of his creditors over another.[12] In the typical case of reputed ownership it is doubtful whether, even at the present time, a court of common law could give relief, because the doctrine of equitable estoppel, while often talked about by common law judges, was very gingerly applied by them, and certainly could not confer a title so as to justify a possessory action, although it might perhaps operate by way of defence to an asserted title.[13]

[12]Huntley *v.* Kingman (1894) 152 U. S. 527, 532; Dodge *v.* McKechnie (1898) 156 N. Y. 514; Meaux *v.* Howell (1803) 4 East, 1; Pickstock *v.* Lyster (1815) 3 M. & S. 371; Darvill *v.* Terry (1861) 6 H. & N. 807. "It is entirely well settled, both in England and America, that at common law a debtor in failing circumstances has a right to prefer certain creditors to whom he is under special obligations, though by such preference the fund for the payment of the other creditors be lessened or even absorbed." Huntley *v.* Kingman (1894) 152 U. S. 527, 532.

[13]See opinion of Lord Denman, C. J., in Pickard *v.* Sears (1837) 6 A. & E. 469.

Could equity give relief unaided by statute? In the case of a preference it was never able to give more than passive relief. It could forbid the preferred creditor using its processes to gain more by means of dividends on his claim,[14] but it could not take from him the property which he had in this manner received. On the other hand, it cannot be doubted that equity can right a case of reputed ownership, which simply boils down to a matter of estoppel;[15] also it seems clear that an estoppel may create an equity which is capable of even affirmative enforcement.[16] And it is much more likely that Chancery could find strength to handle a case of fraudulent transfer than that the common law courts could, as Lord Mansfield vainly imagined,[17] because there is at least one Pre-Reformation instance where relief was given in Chancery for that sort of situation.[18]

Looking back from present-day vantage ground, however, although we may presume to say that all these wrongs could have been righted if left to what Jessel, M. R., has styled "the gradual growth of equity,"[19] the fact is that in the beginning the matter was not left to the Court of Chancery. On the contrary, the merchants of England went to Parliament for relief, and legislation, not equity, was the first agent of progress.

If we are to seek a reason for this choice of legislation over equity, it can be found, it is submitted, in the history of the Court of Chancery. The evil doings of debtors were recognized facts of daily existence long before the merchant public of England acquired the habit of going to the Court of Chancery with their grievances. Even prior to the publication of English reports, and in the dawn of English institutions, the practice was common for a debtor to convert his property into money and then with the money enjoy life to the exclusion of his creditors.[20] The great

[14]Wilson *v.* Paul (1836) 8 Sim. 63.

[15]See Frelinghuysen *v.* Nugent (1888) 36 Fed. 229.

[16]Davis *v.* Wakelee (1895) 156 U. S. 686; Clark *v.* Chase (1906) 101 Me. 270.

[17]Cadogan *v.* Kennett (1776) 2 Cowp. 432.

[18]Case in Cal. of Chancery, i. xcix (1477), Selden Society, Select Cases in Chancery, p. xli. Plaintiff was appointed to a rectory. His predecessor had allowed the church choir and parsonage house to become dilapidated, but to prevent any claim against his representatives, he made no will, but gave all his goods to defendant by deed of gift. Decree for plaintiff in the sum of 26 marks.

[19]*Re* Hallett's Estate (1878) 13 Ch. D. 696.

[20]The recitals in the Statute of 50 Edw. III, c. 6, would almost precisely apply to some present-day practices: "Divers people [it states], do give their tenements and chattels to their friends, by collusion thereof to

Statute of Fraudulent Conveyances[21] was by no means the first attempt of the English Parliament to legislate against the evils so graphically portrayed in its recitals. No less than three Statutes of Fraudulent Conveyances were passed prior to the time of Queen Elizabeth,[22] and as far back as the time of Edward III, Parliament forbade practices which have not yet wholly ceased. On the other hand, in the days of Crecy the Court of Chancery was hardly a mercantile court, nor had its stature grown much in this respect when, several centuries later, the great Act of Elizabeth was adopted, and the development of this branch of the law began. Even then the Court of Chancery was not in the highest public esteem. Though Bishops no longer of necessity presided over it, yet the Court had become subject during the time of Henry VIII to the charge of being too free with the process of injunction, or rather of abandoning control of that writ to the sister Court of Star Chamber.[23]

In addition, the Chancery was still too much a part of the Royal Court, and the stain of scandal was all over that Court at the time of Elizabeth's accession. Not only had the Lord Protector Somerset amassed, to the common knowledge, a mighty fortune while in office; not only had certain of his friends, after his fall, been made to disgorge vast sums of public money embezzled;[24] it was not enough for the Receiver-General of York-

have the profits at their will, and after do flee to the franchise of Westminster, of St. Martin's LeGrand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant." Of course in those days it was necessary for the debtor to flee to sanctuary in order to escape imprisonment for debt. Nowadays a fraudulent debtor does not need the protection of Westminster, because imprisonment for debt has been abolished. So far as his personal liberty is concerned, he can, to quote the words of the old Statute, "live a great time with an high countenance of another man's goods," wherever he pleases, instead of being bound by the jail liberties.

[21] 13 Eliz. c. 5.

[22] See Bigelow, Fraudulent Conveyances, 11 *et seq.*

[23] In the reforms demanded by the Catholics of the North in 1536 was the following: "That the common laws may have place, as was used in the beginning of your Grace's reign; and that all injunctions be clearly decreed, and not to be granted unless the matter be heard and determined in Chancery." Froude, History of England, ch. 13. See also Roper, Life of More, 42-3, for an account of a controversy Sir Thomas More, while Chancellor, had with the common law judges over this vexed question of injunctions.

[24] "Sir Thomas Smith and Sir Michael Stanhope were made to refund £3000 each of public money which they had embezzled: Sir John Thynne as much as £6000." Froude, Reign of Edward the Sixth, ch. 4.

shire to "buy my own land with my own money" as King Edward VI drily records, but the taint had reached the sanctuary of the Court of Chancery. The King himself records in his journal that Beaumont, Master of the Rolls, confessed "how he, being judge in the Chancery, between the Duke of Suffolk and the Lady Powis, took his title, and went about to get it into his hands, paying a sum of money, and letting her have a farm of a manor of his; and caused an indenture to be made falsely with the old Duke's counterfeit hand to it by which he gave these lands to the Lady Powis."[25] If there was little tendency on the part of the merchant body to look to the Court of Chancery for aid when it was in the hands of such men as Archbishop Warham and Sir Thomas More before the time of Queen Elizabeth, it is hardly likely that they would have considered the Court as improved by the presence of Sir Christopher Hatton, or of such as he who thus confessed his crimes to a young sovereign.

Consequently the merchants of England obtained their relief from another source; they went to Parliament. And so the year 1577 was marked by the Statute of Fraudulent Conveyances[26] which declared void as against his "creditors and others," all the debtor's transfers of property when made with intent to hinder, delay or defraud them. By this enactment one of the classes of wrongs we have mentioned was made cognizable by courts of law. Cases of reputed ownership and preferences still went unscathed, but fraudulent conveyances were directly banned.

This Statute has passed with the common law into all our States, it is a part of every bankrupt act, and however re-enacted in modern dress it may be to suit the taste of our legislators, it is always present with us.[27] Though it had its predecessors, as we have seen, yet for all practical purposes it may be considered as the first of its kind, for, while the others were ignored, the Statute of Elizabeth came under the attention of the Lord Coke, who, it may be said, put it into the common law with his marvelous gloss in the famous case of Twyne.[28] You cannot read far in the law of fraudulent conveyances before you come to *Twyne's Case;* it is Coke who introduces you to the Statute.

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[25]King Edward's Journal, printed in Burnet's Collectanea; cited in Froude, *op. cit.*

[26]13 Eliz. c. 5.

[27]Coder *v.* Arts (1909) 213 U. S. 223; Hall *v.* Alabama Terminal Co. (1904) 143 Ala. 464, 2 L. R. A. [N. S.] 130.

[28](1601) 3 Co. Rep. 80 b.

The Statute, however, did not settle the conflict between the two theories of creditors' rights, and Coke does not venture upon this theme in his report of *Twyne's Case*. But the Statute at least did this,—it provided a remedy which could be used on either theory, and left it to the courts to say which should prevail. So with this Statute as providing a remedy in one of the three classes of wrongs already stated, it was but natural that the conflict should soon pass into the practical from the speculative, and present a problem which some day or other had to be solved.

At this point we may return to our creditor holding a judgment which is a lien upon his debtor's land, or an execution which from the time of its delivery to the sheriff is a lien upon the debtor's goods. Having acquired his judgment, the creditor may use the common law remedy conferred upon him by the Statute of Elizabeth. If the debtor has conveyed the goods after the writ has been issued to the sheriff, but before the latter has actually levied, the creditor can cause the sheriff to sue for infraction of the modern lien which he has from the issuance of the execution.[29] Or, if the debtor has created a fraudulent lien upon the property, the sheriff, after levying, may contest the lien by such methods as would be proper, considering his right of possession.[30] Or the creditor himself may sue the transferee for damages in that his remedy under the writ of execution was delayed by means of the fraudulent transfer.[31]

The same proposition applies under the modern statutes which make a judgment a lien upon the debtor's real estate from the moment of its docketing, and allow the land to be sold under execution issued on the judgment. If the debtor thereafter conveys this property fraudulently or has conveyed it fraudulently before the judgment is entered, the judgment creditor, if he pleases, may avail himself of his common law rights. "It is well settled," says the New York Court of Appeals, "that where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution and the purchaser will have the right to impeach the conveyance in an

[29]Hess *v.* Hess (1889) 117 N. Y. 306.

[30]As has recently been said: "A sheriff who levies upon chattels by virtue of an execution acquires a special property therein and may sue anyone who takes them from his possession, as for goods rescued, either to recover the possession thereof or damages for their conversion." Dickinson *v.* Oliver (1909) 195 N. Y. 238, 241.

[31]Meaux *v.* Howell (1803) 4 East, 1.

action at law to recover the premises."[32] And in the case of goods the judgment creditor has still another remedy by virtue of the Statute of Elizabeth. When the sheriff thus levies, he has in behalf of the plaintiff a qualified property right of possession which enables him to resist anyone else taking the property from him, or to sue by a possessory action anyone who takes the property out of his charge.[33]

But this method of procedure, while good enough as far as it went, was not sufficient for all the purposes of the creditor. In the first place, the sheriff could not seize all kinds of personal property. His writ did not reach choses in action. And while of late years statutes have rendered tangible evidences of debt liable to execution, yet the tendency in some States is to construe these statutes strictly, with the result that while the sheriff can levy upon such property, if he can find it, he can bring no action to reach it when it has been fraudulently encumbered or transferred.[34] Hence such enabling acts do not help much where the debtor is insolvent. And it never was possible for the writ of execution to reach what are commonly styled equitable assets, such as the interest of the debtor in a trust estate. Thus the common law remedy failed to cover many cases of fraudulent conveyances, because the common law rested upon too narrow a conception of property.

It was natural that the Court of Chancery should extend its aid to the creditor who otherwise would have suffered in all such cases. This impulse the Court recognized almost as soon as the merchant public began to seek its aid, as finally happened in course of time. The ancillary jurisdiction which thus started was invoked by what is known as a judgment creditor's bill. The creditor who for one or the other of the reasons above given had failed to obtain seizure of his debtor's property under execution, filed in the Court of Chancery a bill asking that Court to compel the debtor to turn over to a receiver his interest in the property in question, so that the Court could sell it and pay the proceeds thereof to the complaining creditor in satisfaction of his debt. As the Court would not take jurisdiction of such a bill until

[32]Bergen *v.* Carman (1879) 79 N. Y. 148, 153; Hillyer *v.* LeRoy (1904) 179 N. Y. 369, 376; Smith *v.* Reid (1892) 134 N. Y. 568.

[33]Van Etten *v.* Hurst (N. Y. 1844) 6 Hill, 311; Hess *v.* Hess (1889) 117 N. Y. 306.

[34]Anthony *v.* Wood (1884) 96 N. Y. 180; Hess *v.* Hess (1889) 117 N. Y. 306, 308.

it was satisfied that the plaintiff was really a creditor, the requisite to this relief was that the plaintiff should first obtain a judgment at law and show that the ensuing writ of execution could not reach the property. The best way of showing this was by the certificate of the sheriff to that effect, so consequently the judgment creditor's bill usually exhibited (1) a judgment, and (2) the execution with the sheriff's return of *nulla bona*. When statutes were passed making a judgment a lien upon land without the issuance of execution, the prerequisite of an unsatisfied return of the execution would not exist if the debtor owned only land.[35] From an early date, also, a distinction was recognized as to the necessity of showing an unsatisfied execution. If the defendant owns only "equitable assets," such as an interest in a trust estate, a chose in action, or other property upon which the sheriff cannot levy by reason of the limitations of the common law writ, it was necessary for the plaintiff to show an unsatisfied execution, for otherwise *non constat* the sheriff might have been able to find leviable property. On the other hand if the plaintiff merely for convenience seeks the aid of equity to set aside a fraudulent conveyance, he need not show an unsatisfied execution, because it is not to be doubted that he could have levied, but it is recognized that he always has the option of asking the aid of equity.[36] But if the bill is framed in both aspects, it clearly should show an unsatisfied execution. By parity of reasoning, if it relates to specific real property, then, on properly describing it, the bill when filed operates as a *lis pendens* which will bind an interlocutory purchaser,[37] but on the other hand, it is not essential

[35]"It is not necessary for him to take out execution upon his judgment. The judgment constitutes a lien upon the land, and there is no necessity of compelling the creditor, as a mere matter of form, to incur the further expense at law of issuing an execution. It is, perhaps, most advisable for him to do so. It may avoid a contest with the subsequent execution creditor; for although the judgment is a lien upon the land, an execution upon a subsequent judgment acquires, upon its delivery to the officer by virtue of the statute, a prior lien upon the property. * * * But if it is the personal property of the debtor which the creditor wishes to reach and appropriate to the payment of his judgment, he must take out an execution upon his judgment before he can exhibit his bill; for it is by the execution, and not by his judgment that he acquires a lien upon the personal property." Dunham *v.* Cox (1855) 10 N. J. Eq. 437, 466-7.

[36]Angel *v.* Draper (1686) 1 Vern. 399; Shirley *v.* Watts (1744) 3 Atk. 200; McDermutt *v.* Strong (N. Y. 1820) 4 Johns. Ch. 687; Beck *v.* Burdett (N. Y. 1829) 1 Paige, 305; Dunham *v.* Cox (1855) 10 N. J. Eq. 466.

[37]Miller *v.* Sherry (1864) 2 Wall. 237; Griffith *v.* Griffith (N. Y. 1841) 9 Paige, 317.

from any other aspect, that the bill should be so specific.[38] The creditor may, if he pleases, file his bill in his own behalf alone or in behalf of such creditors similarly situated who may desire to make themselves parties to the bill. These, under the well settled practice, can intervene at any time prior to the interlocutory decree of distribution. But it would appear to be settled that only judgment creditors can come in, because no one who is without a judgment is eligible to intervention.[39] And it is equally well settled that the creditor need not make his bill representative even to this extent. He can, at his option, bring the action exclusively in his own behalf, in which event no other creditors can intervene.[40] It follows that although it is optional with the plaintiff to permit other creditors to intervene, yet it is by no means necessary, and indeed, the other creditors are not in any sense of the word necessary parties to the bill.[41]

In short, the jurisdiction of equity in the case of the judgment creditor's bill is strictly ancillary; it is merely in aid of the rights at law conferred by the judgment. This ancillary character is clearly shown by the cases which touch upon the right of the creditor to bring this proceeding to reach real estate which the debtor has fraudulently conveyed. As we have already seen, the creditor may proceed to sell under his execution without regarding the conveyance, treating it as void under the Statute of Fraudulent Conveyances. "He may, but he is not bound to file a creditor's bill to set aside the conveyance."[42] In other words, the judgment creditor's bill is at hand as an optional remedy to clear off the fraudulent liens on the land if the creditor desires to avail himself of it, but he is not obliged to. In the average case, however, it is better to resort to the equitable remedy, and

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[38]Williams *v.* Amer. Ass'n (1912) 197 Fed. 500; Koelhefer *v.* Peterson (N. Y. 1913) 82 Misc. 180.

[39]Edmeston *v.* Lyde (N. Y. 1829) 1 Paige, 637; Senter *v.* Williams (1895) 61 Ark. 189; Wallace *v.* Treakle (Va. 1876) 27 Gratt. 487. "The first question in this case is as to the rights of the other judgment creditors of the defendants, and whether they are necessary parties. It might be sufficient in this case to say they do not stand in the same right with the complainants, as it does not appear by the answer that executions in those causes have been actually returned unsatisfied; which was necessary to give them any right to come into this court for relief. Beck *v.* Burdett, 1 Paige, 305." Chancellor Walworth in Edmeston *v.* Lyde (N. Y. 1829) 1 Paige, 637, 638.

[40]Edmeston *v.* Lyde, *supra;* Claflin *v.* Gordon (N. Y. 1886) 39 Hun, 56.

[41]White's Bank *v.* Farthing (1886) 101 N. Y. 344.

[42]Bergen *v.* Carmen (1879) 79 N. Y. 148, 153.

it is rare that any other course is pursued.[43] The option thus given the creditor between the legal and equitable remedy has been put in this way:

"A judgment creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditor's bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests the debtor's assets are reached and applied."[44]

It follows that the Court of Chancery will aid the creditor only when there is no other property which he can reach without the aid of this bill.[45]

So far as we have gone it is apparent that equality of distribution was not the aim of the procedure under review. Obviously, this must be so with common law process. The common law was essentially incapable of effecting equality of dis-

[43]The practical reasons which experience demonstrates for preferring the equitable remedy are thus described in a recent case: "It was at the option of the judgment creditors either to proceed at law and sell the land and test the validity of the conveyance by an action of ejectment, or to first file their bills in this court to procure a declaration that the conveyances were void, and then to sell the lands for the payment of the debts. The latter is the usual course in New Jersey, and much the more convenient and equitable, because it insures that the result of the sale will be a title which will not be subject to litigation. It was found in practice that in such cases sales by the sheriff under a judgment and execution, before any declaration had been made by a competent court as to the character of the previous conveyance by the judgment debtor, produced only a nominal sum; and then, if the purchaser procured his title to be validated by a judgment in ejectment, he still held his judgment unsatisfied against the judgment debtor, although he may have obtained value enough in the land to have paid it. And if, in such case, after purchasing at sheriff's sale, without resorting to ejectment, he came into this court, as he might do, to have the title derived under the sheriff's deed declared valid, this court granted relief only upon condition that he should give credit on his judgment for the fair value of the land." Kinmouth *v.* White (1901) 61 N. J. Eq. 358, 360-1. While a judgment is at the present time a lien on the debtor's land, that does not help him, in spite of the Statute of Fraudulent Conveyances, if the debtor has transferred the land prior to the entry of the judgment. See *Re* Estes (1880) 3 Fed. 134.

[44]Jackson *v.* Holbrook (1887) 36 Minn. 494, 498-9. To the same effect see Erickson *v.* Quinn (1872) 50 N. Y. 697, more fully reported in 15 Abb. Pr. [N. S.] 166.

[45]Dunham *v.* Cox (1855) 10 N. J. Eq. 437.

tribution. A common law court can only consider the parties to the record. In behalf of judgment creditor A who has first levied on the debtor's only property, the court must give full effect to his judgment and execution as against creditor B who levied later. A must be paid in full before the others can have anything, and if there is not enough to go around that cannot be helped. And so it is obvious that if left to the common law for the realization of his claim against the insolvent debtor, the creditor must be first on the ground with his execution.[46] That is the sole point that a common law court had power to determine,—who was first in order of time.[47] If the case embraced features which called for such equitable doctrines as marshalling, election or the like, the common law court was powerless to give relief.[48]

In extending its aid to the judgment creditors the Court of Chancery took no broader view. It paid the same respect to the priorities. It was always the practice of the Chancery Court to give priority of payment to the creditor who first filed his bill, as against other creditors who filed later bills or intervened in the cause instituted by the first bill. The reason for that rule was that the equity court was acting in the whole matter purely in aid of the legal right to payment evidenced by the judgment, and accordingly when its own process had seized assets applicable to such purpose for which the plaintiff came into court, that purpose must be fulfilled, and the interveners must take what was left. Hence the plaintiff upon filing his bill obtains at once what is known as an "equitable levy," that is, the same right to priority in payment out of all assets by means of the receivership as though he had been able to get these assets by means of execution. This right of equitable levy is as firmly established as any point in this practice.[49]

In a comparatively late case, Pitney, V. C., has sprung a distinction between the case of real "equitable assets," that is,

[46]At common law the date of levy upon the sheriff's taking possession related back to the *teste* of the writ. The injustice of this procedure, however, which by *ex post facto* process would annihilate the title which a purchaser, innocent of the writ's issuance, had acquired from the judgment debtor, led to the Stat. 29 Car. II, c. 3, § 16, by which priority was determined according to the actual date of levy, as between conflicting executions. This is the modern rule. See Bond *v.* Willett (1865) 31 N. Y. 102.

[47]French *v.* Winsor (1863) 36 Vt. 412; Hendricks *v.* Chilton (1845) 8 Ala. 641.

[48]Kuhne *v.* Law (S. C. 1866) 14 Rich. L. R. 18.

[49]Metcalf *v.* Barker (1902) 187 U. S. 165; Bergmann *v.* Lord (1909) 194 N. Y. 70; Freedman's Sav. & Tr. Co. *v.* Earle (1884) 110 U. S. 710.

assets that were, by their nature, not subject to execution, and "legal assets," that is, property subject to execution but which had been fraudulently encumbered so that equitable process would be convenient for the injured creditor. In the first of these cases, the Vice Chancellor says, the doctrine of "equitable levy" should have full place, but not in the second, because there, the property being subject to levy at law, the liens of the creditors' judgments or executions should be recognized to the same extent as in a court of law.[50] In strict logic, it is hard to criticise this view, though it seems never to have been adopted by the Supreme Court.[51] But from our point of view this distinction is not important, because in either case the court sanctions the idea of priority; it is only a question of a standard to go by in adjudging the priorities.

Enough has been shown, it is believed, to demonstrate the inadequacy of the judgment creditor's bill to secure equality of distribution. It is as selfish and preferential a proceeding as the action at law. In no sense is it a winding up of the debtor's affairs; it has no characteristic of a fair liquidation. True, it portions out the debtor's assets among those creditors who are parties to the action, but it does not do so on a basis of equality. On the contrary, the distribution is wholly upon a basis of priorities—first comes he who has made the "equitable levy," then come those others who have obtained liens by their judgments and executions, and again in the order of their seniority.[52] So the same "race of diligence," so much commended by the courts when their minds were not turned to the fact that the prizes of such a game are pinchbeck instead of gold from a mine of wholesome law, is as necessary with the creditor's remedy in equity, as it is essential to his being made whole by common law process.[53]

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[50]Kinmouth *v.* White (1901) 61 N. J. Eq. 358.

[51]See Miller *v.* Sherry (1864) 2 Wall. 237.

[52]Codwise *v.* Gelston (N. Y. 1812) 10 Johns. 507, 522; *Ex parte* Spragins (1894) 44 S. C. 65; Senter *v.* Williams (1895) 61 Ark. 189; Wilkinson *v.* Paddock (N. Y. 1890) 57 Hun, 196; White's Bank *v.* Farthing (1886) 101 N. Y. 344.

[53]"If the creditor whose execution is first returned unsatisfied pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance." Chancellor Walworth in Edmeston *v.* Lyde (N. Y. 1829) 1 Paige, 637, 640. For a late example of such encomiums, see *In re* Spalding (1905) 139 Fed. 244, 248.

Once more to repeat, there is no process of common law which can secure equality of distribution, and the judgment creditor's bill is just as inadequate. We must remember, too, that in this demonstration we have dealt only with one of the three classes of creditor's injuries, the fraudulent conveyance. We have not used cases of preferential transfer or reputed ownership in this analysis, nor was that necessary, because if equality of distribution cannot be secured in the case of fraudulent conveyance, by means of execution or judgment creditor's bill, of necessity the same result would follow in a case of either of the other classes.

There is, however, another kind of "creditor's bill," which is often confused with its prototype above discussed, but which really is of an entirely different nature and does tend toward equality of distribution. But just how far it goes in that direction, and just where it fails, must be reserved for a later installment.

(To Be Continued.)

Garrard Glenn.

New York.